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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JEAN C. ARGUELLO,

Defendant and Appellant.

B239996

(Los Angeles County  
Super. Ct. No. YA076083)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Lauren Weis Bernstein, Judge. Affirmed.

James Koester, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and  
Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Jean C. Arguello appeals from his conviction of first degree robbery, which was found to have been committed for the benefit of a criminal street gang under Penal Code section 186.22 (statutory references are to the Penal Code unless otherwise indicated). All of his arguments on appeal concern the admission of gang evidence. He contends the trial court abused its discretion in denying his motion to bifurcate the trial on the enhancement and his motion for new trial based on the gang evidence. He also argues his attorney was ineffective because he did not object to testimony by the prosecution's gang expert that appellant's gang had murdered police officers.

We find no basis for reversal and affirm.

### **FACTUAL AND PROCEDURAL SUMMARY**

On the early morning of September 13, 2009, Chad Chapman was returning to his home in Inglewood after work. He stopped to purchase Newport cigarettes and again to buy food at a Popeye's restaurant. The food was in a Popeye's bag and the cigarettes were still sealed. About 4:00 a.m. he parked his car on the street and crossed toward the gate to his building. A car rapidly pulled up in front of his building and two men jumped out and headed toward him at a fast rate of speed. He was aware there was a driver in the car, but could not see whether the driver was male or female. Chapman walked quickly toward the gate of his building in an effort to get away from the men, and he was able to open the security gate with a code. He was accosted by the men inside the gate. One had a knife and the other, identified by Chapman as appellant, had a pump shotgun. The men stood on either side of him. The shotgun was aimed at Chapman's chest and head. Appellant asked Chapman "Where are you from?" Chapman replied "I don't gang bang."

The man with the knife then took the Popeye's bag out of Chapman's hand and started going through his pockets, taking the cigarettes and \$116 (two \$50 bills and some other bills). He handed a \$50 bill to appellant. One or both of the men told Chapman to lift up his shirt and told him to say "Fuck NHP". At that point, appellant was about five feet away. The man with the knife felt around Chapman's neck and looked at Chapman's

stomach and arm. Appellant also looked at Chapman's stomach. When Chapman hesitated about complying with a demand to turn over his watch, appellant jerked the shotgun toward Chapman and asked the man with the knife whether he should shoot Chapman in the leg. He had his finger on the trigger of the shotgun. The man with the knife said "No."

Chapman thought he was going to be shot and was so frightened he urinated on himself. He feared for his life. He gave up the watch and asked the men to let him go because he had a son upstairs. He repeated that he did not gang bang. Appellant walked out of the gate toward the car. The man with the knife demanded Chapman's keys and cell phone. Chapman said they were for work, and he was allowed to keep them. Chapman described the knife as having a black handle and a blade about 11 inches long.

Before the men left, the man with the knife instructed Chapman to say "Fuck NHP." He repeated this demand several times. Chapman understood NHP referred to the Neighborhood Piru gang. The man with the knife also said "Fuck NHP" three or four times, and said this loudly enough to be heard from 17 to 20 feet away. Chapman did not recall appellant saying "Fuck NHP" and appellant did not instruct Chapman to say that phrase.

The two men got back into the vehicle in which they had arrived, a white Toyota Solara or Dodge Stratus. It drove away. Chapman called 911. An officer responded within five minutes. Shortly after that, the officer took Chapman to make a field identification. Chapman identified appellant and the car which was involved in the robbery.

Exhibit 2, a knife, had a blade and handle similar to the knife used in the robbery, but Chapman did not recognize a jagged edge (a hook) on the top part of exhibit 2. He described the shotgun as silver and black and about three feet long. It was not recovered. Chapman identified a sealed Newport menthol box of cigarettes later recovered from the car in which appellant was a passenger when detained (People's exhibit 3), as the brand he had purchased just before the robbery. It appeared to be the same pack taken from him in the robbery. Chapman also identified appellant from a lineup.

Appellant was charged with one count of first degree robbery (§ 211) with allegations that a principal personally used a firearm in the commission of the robbery and that it was committed for the benefit of a criminal street gang (§§ 12022.53, subds. (b) and (e)(1), 186.22, subd. (b)(1)(C)). His motion to bifurcate the gang allegation was denied. Appellant's girlfriend, Marisela Ricalde, testified to an alibi for the time of the robbery. Appellant testified in his own defense and corroborated Ricalde's version of their whereabouts at the time of the crime. A defense expert testified about the inaccuracies of eyewitness identification under conditions like those presented here.

The jury found appellant guilty as charged and found the special allegations true. The trial court denied appellant's motion for new trial. Appellant was sentenced to state prison for an aggregate term of 23 years. He filed this timely appeal.

## **DISCUSSION**

As we have noted, all of appellant's arguments on appeal arise from the trial of, and evidence concerning, the gang enhancement.

### *A. Procedural Background*

Prior to trial, counsel for appellant moved to bifurcate the trial of the gang enhancement from the robbery because of prejudice from the gang evidence. The trial court cited *People v. Hernandez* (2004) 33 Cal.4th 1040 (*Hernandez*) for the proposition that it is within the court's discretion to bifurcate trial of the gang enhancement. The court said: "You know, to me, this whole thing is inexorably linked to the robbery. The words that are used create fear. In fact, the alleged victim in this case said that he peed on himself. He was so nervous. I think that you can't really separate it out from the charged offense, and in my discretion, I'm exercising my discretion. [¶] I don't think it makes the crime any more prejudicial than it would be for the jurors to hear that he pointed a long barrel shotgun and that the other guy had a knife. I just think it is so linked and so closely connected, that I'm not going to bifurcate it, but you made your motion for the record."

Detective Kerry Tripp of the Inglewood Police Department's gang intelligence unit testified as the prosecution gang expert. He had known appellant for several years and knew that he was an active member of the Inglewood 13 gang with the moniker "Wako."<sup>1</sup> Detective Tripp identified photographs depicting appellant with Inglewood 13 tattoos and throwing Inglewood 13 gang signs.

At the time of this robbery, the Inglewood 13 gang had between 400 and 500 members. When asked what kinds of crimes members of the Inglewood 13 had committed in cases he had personally investigated, Detective Tripp answered: "They had committed crimes. They murdered police officers. They shot." Defense counsel made a continuing objection "to the narrative," which was overruled. Detective Tripp expanded his answer: "They have murdered police officers. They have shot at police officers. They have shot one of our police officers. They possess narcotics. They sell narcotics. They possess weapons. They transport weapons. They fight with the police. They fight with rival gang members. [¶] They have murdered rival gang members. They have attempted to murder rival gang members. They have attempted to murder police officers. They have robbed people. They have burglarized and committed various other crimes." There was no objection to this testimony.

Detective Tripp testified that the primary activities of the Inglewood 13 gang are murder, robbery, rapes, shootings, shooting and murdering police officers, gang graffiti and trying to kill their own members suspected of snitching. The Inglewood 13 and

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<sup>1</sup> When Detective Tripp said appellant was a member of Inglewood 13, the court on its own motion reread the admonishment to the jury that evidence of gang activity could be considered only for the purpose of deciding whether "defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related crime and enhancements charged or the defendant had a motive to commit the crime charged. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you contract [*sic*] facts and information relied on by an expert witness in reaching his or her opinion. You may not consider this evidence [for] any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime."

Neighborhood Piru gangs are rivals whose territories overlap. There had been shootings and homicides between them. Neighborhood Piru abbreviates its name “NHP.”

Detective Tripp explained that “putting in work” means doing something for recognition, usually a violent act against a rival member. More recognition is gained from crimes committed against gang rivals or police officers. The reputation of a gang is important because if a gang is perceived as weak, it will be targeted by other gangs for acts of violence and taking over territory. Detective Tripp explained that gangs commit acts of violence such as robberies, rape, violence, or assaults so that people in the gang’s neighborhood will be afraid to call the police. Crimes are committed openly to instill fear and intimidation in rivals and citizens at large. This is true for the Inglewood 13 gang. According to Detective Tripp, if a gang member asks somebody “where they’re from”, he or she is trying to find out whether that person is a member of a rival gang: “If you are, depending on how you answer that question can lead to a violent act of assault or even homicide.” This standard phrase is also used to threaten and challenge someone.

Detective Tripp was given a hypothetical question based on the facts of this case.<sup>2</sup> Based on those facts, Detective Tripp opined that the robbery of Chapman was committed for the benefit of the Inglewood 13 gang. In his opinion, the perpetrators were looking for an NHP rival gang member because Chapman was asked where he was from,

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<sup>2</sup> He was asked to assume that an African American male was walking home at 4:00 a.m. on September 13, 2009 when a white car pulled up, stopped, and turned off its lights. Two Hispanic men exited the vehicle, armed with a shotgun and a knife. The man with the shotgun approached the victim and asked where he was from while pointing the shotgun at the victim’s upper body. The victim said he did not gang bang. The man with the knife felt around the victim’s neck area, then took the Popeye’s bag, \$116, and cigarettes from the victim. He gave the man with the shotgun a \$50 bill. Both men looked at the victim’s body and arms, and the victim was required to lift up his shirt. He was told by the man with the knife to say “Fuck NHP.” When the victim hesitated about turning over his watch, the man with the shotgun asked the other man whether he should shoot the victim in the leg. The man with the knife said he should not. After asking for, but not taking the victim’s cell phone and keys, the man with the shotgun returned to the vehicle. The man with the knife followed, saying “Fuck NHP.” They entered the vehicle and left the location.

and the man with the knife said ““Fuck NHP.”” The victim fit the racial and age profile of members of the Neighborhood Piru gang. In Detective Tripp’s opinion, asking Chapman to lift his shirt to be examined meant that appellant and the man with the knife were looking for gang tattoos. If Chapman had been a member of Neighborhood Piru, assaulting him would have benefited Inglewood 13 by creating notoriety. Based on the behavior of the man with the knife, in Detective Tripp’s opinion, that man also was a member of the Inglewood 13, acting in concert with appellant. This supported his opinion that the crime was committed for the benefit of the gang.

Detective Tripp testified that Inglewood 13 member Josa Jara was convicted of carrying a loaded firearm in 2009. Member David Felix was convicted of an attempted murder of a perceived rival gang member, committed in June 2006. Inglewood 13 member Javier Lara was arrested for carrying a loaded firearm in April 2006 and convicted of that crime.

After the jury reached its guilty verdict, appellant moved for a new trial. Although a number of grounds were raised, his only contention on appeal is that the court erred in refusing to bifurcate trial of the section 186.22 gang enhancement, and that this led to the admission of irrelevant and highly prejudicial evidence through Detective Tripp’s testimony, which should have been excluded under Evidence Code section 352. At the hearing on the motion, defense counsel argued the gang evidence was not relevant to motive or intent. As a result, appellant contends, the trial was fundamentally unfair in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. At the hearing on the motion, defense counsel argued that apart from the gang evidence, there was insufficient evidence to support appellant’s conviction for the robbery.

The trial court disagreed with defense counsel. The court stated that it had reread portions of the trial transcript and noted that the first words by appellant during the incident were ““Where are you from?”” It also noted that Chapman was made to say ““Fuck NHP”” three to four times during the course of the robbery, which Detective Tripp testified was consistent with behavior by gang members who wanted to increase

their status within the gang. The court did not credit Ricalde's alibi testimony. It also considered the evidence found in the car when appellant was detained, including the Popeye's bag of food, knife, and Newport cigarettes in a sealed pack. In addition, appellant had a \$50 bill in his possession when arrested. The court concluded that this was a gang related crime and that the gang evidence provided the motive for the crime. The motion was denied.

### *B. Bifurcation*

The trial court had discretion to bifurcate the trial of the section 186.22 enhancement. (*Hernandez, supra*, 33 Cal.4th at p. 1048.) The Supreme Court, however, in recognizing that discretion, observed that "less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation. [Citation.]" (*Ibid.*) It contrasted bifurcation of a gang enhancement from bifurcation of trial of the truth of an alleged prior conviction. It observed that the Legislature had "specifically recognized the potential for prejudice when a jury deciding guilt hears of a prior conviction" by enacting section 1025, subdivision (e).<sup>3</sup> (*Id.* at p. 1049.) In contrast, "the Legislature has given no indication of a similar concern regarding enhancements related to the charged offense, such as a street gang enhancement. Nothing in section 186.22 suggests the street gang enhancement should receive special treatment of the kind given prior convictions. [Citations.]" (*Ibid.*)

The *Hernandez* court acknowledged bifurcation may be appropriate because the predicate offenses offered to establish a pattern of criminal gang activity need not be related to the charged offense or the defendant, and that evidence of such offenses may be unduly prejudicial, warranting bifurcation. (33 Cal.4th at p. 1049.) It also recognized that other gang evidence, even related to the defendant, "may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict

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<sup>3</sup> Section 1025, subdivision (e) provides: "If the defendant pleads not guilty, and answers that he or she has suffered the prior conviction, the charge of the prior conviction shall neither be read to the jury nor alluded to during trial, except as otherwise provided by law."



regardless of the defendant's actual guilt." (*Ibid.*) But it concluded that, "[t]o the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Id.* at pp. 1049–1050.)

In *Hernandez*, the court held that even if some of the evidence to prove the gang enhancement would be inadmissible to prove the charged offense, e.g. if it was excluded under Evidence Code section 352, bifurcation may still be denied. (*Hernandez, supra*, 33 Cal.4th at p. 1050.) It noted countervailing factors favoring a unitary trial, e.g. avoiding confusing the jury with collateral matters. (*Ibid.*) It concluded that "the trial court's discretion to deny bifurcation of a charged gang enhancement is similarly broader than its discretion to admit gang evidence when the gang enhancement is not charged." (*Ibid.*) In *Hernandez*, the court found that much of the gang evidence was relevant to the charged offense. The defendant told one of the robbery victims that she did not know whom she was dealing with and identified himself as a gang member. (*Id.* at p. 1083, 1050–1051.) The court concluded that the defendant had attempted to use his gang status in demanding money from the victim. Although one of the defendants did not specifically identify himself as a gang member, "the evidence showed the robbery was a coordinated effort by two gang members who used gang membership as a means to accomplish the robbery." (*Id.* at p. 1051.) Under these circumstances, the court reasoned that the gang expert's testimony "helped the jury understand the significance of [one defendant's] announcement of his gang affiliation, which was relevant to motive and the use of fear." (*Ibid.*)

Similarly here, Chapman's response to appellant's challenge asking "'where are you from'" demonstrates that he knew he had been accosted by gang members and was so fearful he urinated on himself. The fact that appellant and his accomplice checked him for tattoos supports the inference that they suspected Chapman was a member of a rival gang, particularly since he fit the profile of members of Neighborhood Piru. Finally, the accomplice forced Chapman to repeat the phrase "Fuck NHP" and repeated it several times himself. Although appellant did not make this statement, he had already interjected

gang connotations into the incident by asking Chapman, in gang parlance, for his gang affiliation. As in *Hernandez*, Detective Tripp's testimony helped the jury understand the significance of this conduct, which was relevant to the fear element of robbery. Under these circumstances, the gang evidence was relevant both to the crime charged and the enhancement, which were intertwined. We find no abuse of discretion in denial of the motion to bifurcate on this ground. In light of this conclusion, we need not discuss respondent's alternative arguments in support of denial of bifurcation.

### *C. Ineffective Assistance*

Appellant argues his trial counsel was ineffective in several respects. First, he complains that his attorney failed to bring a pretrial motion in limine to exclude Detective Tripp's anticipated testimony that members of the Inglewood 13 had murdered police officers. Appellant contends his counsel should have been aware that Detective Tripp would give this evidence because this was his testimony at the preliminary hearing. Appellant argues there is no rational excuse or tactical reason for this omission. He also complains that counsel failed to object and did not move to have this testimony stricken during Detective Tripp's testimony. Respondent argues that appellant has failed to demonstrate that defense counsel's performance was prejudicially deficient.

A criminal defendant has the right to effective assistance of counsel under the Sixth Amendment to the federal Constitution and article I, section 15 of the California Constitution. (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1101.) "A claim of ineffective assistance requires the defendant to establish '(1) that counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.'" (*People v. Homick* (2012) 55 Cal.4th 816, 893, fn. 44, quoting *People v. Rodriguez* (1994) 8 Cal.4th 1060, 1126.) "Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome.””” (In re Harris (1993) 5 Cal.4th 813, 832–833; see also *People v. Ledesma* [(1987)] 43 Cal.3d [171,] 216–217; accord, *Strickland v. Washington* (1984) 466 U.S. 668, 687.)” (*People v. Simmons* (2012) 210 Cal.App.4th 778, 796.)

If a defendant “cannot show prejudice, we may reject his claim of ineffective assistance, and need not address the adequacy of trial counsel’s performance. (*Strickland, supra*, 466 U.S. at p. 697; *People v. Lawley* (2002) 27 Cal.4th 102, 136.)” (*People v. King* (2010) 183 Cal.App.4th 1281, 1298.) That is the situation presented here. Chapman identified appellant as the man who held the shotgun during the robbery on four separate occasions: at the field identification, the line-up, the preliminary hearing and trial. When appellant was detained shortly after the robbery, he was in possession of a \$50 bill, which Chapman testified was given to appellant by the accomplice, and a sealed cigarette pack of the brand taken from Chapman. A knife resembling the one used in the robbery and a bag of Popeye’s food were recovered from the car in which appellant was riding at the time of his detention. In light of this overwhelming evidence of appellant’s guilt, he cannot show ““that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different’ . . .” (*Id.* at p. 1303.)

#### *D. Denial of New Trial Motion*

Appellant argues we must review denial of his motion for new trial de novo, citing *People v. Albarran* (2007) 149 Cal.App.4th 214, 224, fn. 7. But the Supreme Court applies the deferential abuse-of-discretion standard. (*People v. Lightsey* (2012) 54 Cal.4th 668, 729.) ““““A trial court’s ruling on a motion for new trial is so completely within that court’s discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.”””” (*Ibid*, quoting *People v. Thompson* (2010) 49 Cal.4th 79, 140.)

Appellant argues that Detective Tripp’s expert testimony was not relevant to what he characterizes as the primary issue in the case, appellant’s identity as one of the robbers. He also argues that the gang evidence, especially testimony that Inglewood 13

members had murdered police officers, was so inflammatory that it should have been excluded as more prejudicial than probative under Evidence Code section 352. He also contends that Chapman's identification of him as one of the robbers was seriously undermined by the testimony of defense expert Robert Shomer, who testified about the factors which render an eyewitness identification inaccurate.

We have concluded that the trial court did not abuse its discretion in denying bifurcation of the gang enhancement because Detective Tripp's testimony was relevant to explain the fear element of the robbery. Although the evidence of the Inglewood 13 gang's activities, including murders and shootings of gang rivals as well as police officers was inflammatory, it was not so prejudicial as to warrant a conclusion the trial court abused its discretion in denying the new trial motion. As the trial court observed, this was a gang-related crime.

#### **DISPOSITION**

The judgment of conviction is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.